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IN THE

Supreme Court of the United States

October Term, 1961

No. 234

MARIE BENZ, 320 East Main Street,
Hamburg, New York,

Petitioner,

vs.

NEW YORK STATE THRUWAY AUTHORITY,
119 Washington Avenue, Albany, New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled case on May 8, 1961 pursuant to a decision dated April 27, 1961.

Citations to Opinions Below

The memorandum opinion of the Supreme Court of the State of New York is unreported and is printed at pages 5-11 of the Record. The memorandum of the Appellate Division of the Supreme Court is reported at 11 App.

Div. 2d 906, 205 N. Y. Supp. 2d 1004, and is printed, together with the Court's order, at pages 26-28 of the Record.

The majority and dissenting opinions of the Court of Appeals of the State of New York are reported at 9 N. Y. 2d 486; 215 N. Y. Supp. 2d 47; 174 N. E. 2d 727; and are printed in Appendix A, *infra.*

Jurisdiction

The judgment of the Court of Appeals of the State of New York was made and remitted to the Supreme Court of the State of New York on April 27, 1961. The judgment of the Court of Appeals of the State of New York became the judgment of the Supreme Court of the State of New York by an order dated May 8, 1961, which was entered in the Office of the Clerk of the County of Erie on that date. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3) [Since the petitioner has been deprived of her property without just compensation (*i.e.* due process of law)].

Questions Presented

1. Whether a citizen receives the due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution when her land has been appropriated by a New York State Public Authority and, due to a mistake of fact or the fraud of an agent of the said Authority, acting within the scope of his employment, she is to receive only one-twentieth of its value as compensation.

2. Whether the sovereign immunity of New York State can insulate the New York State Thruway Authority from suit for rescission or reformation of a contract wherein

a citizen has been fraudulently deprived of her property without just compensation, while at the same time the Authority retains the benefits of that contract.

3. Whether the just compensation requirement embodied in the Due Process Clause of the Fourteenth Amendment overrides a state's immunity from suit so as to give state courts jurisdiction over an action by a defrauded citizen to rescind or reform a contract by which she is to be paid only one-twentieth of the value of her land which a State Public Authority had previously appropriated.

4. Whether the State of New York can, without violating the Due Process Clause of the Fourteenth Amendment, confer all the immunity from suit which it possesses on the New York Thruway Authority when the latter fraudulently deprives a citizen of just compensation after it has appropriated her land.

Constitutional Provision Involved

The Constitutional provision involved in this case is U. S. Const., Article XIV, Sec. 1, "* * * nor shall any state deprive any person of life, liberty, or property, without due process of law * * *."

Statement of Case

Petitioner owned certain property which the respondent appropriated for construction of a portion of the New York State Thruway. The appropriated land bisected the total tract of land owned by petitioner, and as a result of the appropriation, a major part of the remainder became inaccessible.

Subsequent to the appropriation and after much negotiation, petitioner and one William Hennessy, a proper agent of the respondent, agreed that the total compensation petitioner would receive would be $3,500.00, plus 90% of the value of the rear tract of petitioner's land which had been severed from the front tract, plus an added sum to compensate petitioner for the purchase of an access route to the said rear tract. Thereupon they entered into the agreement which petitioner seeks to rescind or reform.

Although that agreement sets forth only the sum of $3,500.00 and purports to be in full payment, the said Hennessy, at the time of its execution, specifically told petitioner that it was only for part of the compensation she would receive; this was in fact false and he knew it to be false at that time. The sum of $3,500.00 represents approximately one-twentieth of the total value of the land appropriated.

Subsequently, representatives of respondent repeated the misrepresentations of Hennessy, and the petitioner and her husband, being elderly people, relied upon these representations from the New York State Thruway Authority.

Petitioner was not advised of the true import of the said agreement until she contacted an attorney. Promptly thereafter, she brought the action in the Supreme Court of the State of New York to reform or rescind the contract. She has consistently refused to accept the $3,500.00 until the balance due her is also paid.

Respondent appeared specially and moved to dismiss the complaint on the ground that the respondent enjoys the same sovereign immunity as the State of New York

itself, and that such immunity bars an action of this nature. The Supreme Court of the State of New York accepted this theory and dismissed the complaint on the ground of lack of jurisdiction over the subject matter. The Appellate Division unanimously affirmed. The Court of Appeals of the State of New York, in a four to three decision, affirmed the judgment of the Appellate Division. Petitioner has no further avenue of appellate review in the state courts of New York.

The Federal Question

Respondent's motion to dismiss was opposed by petitioner in the trial court on several grounds, one of which was specifically entitled, "The denial of jurisdiction would constitute an unconstitutional deprivation of property without just compensation". This was reiterated by counsel for the petitioner in the Appellate Division and was again relied upon in the Court of Appeals. The arguments presented in all of petitioner's briefs and in the oral arguments of counsel specifically referred to the Due Process Clause of the Fourteenth Amendment to the United States Constitution and its extension of the Just Compensation Clause of the Fifth Amendment to the states. *Chicago, B. & Q. Ry. Co. v. Chicago*, 166 U. S. 226, 241.

Thus, the federal question was timely raised and preserved by petitioner at all levels of this case. This is shown beyond question in the Court of Appeals by reference to Point V of the Points of Counsel in the official report of that Court's decision at 9 N. Y. 2d 486, 488 (page 14, *infra*). Since the question was properly raised, the state court's failure to deal with it expressly was not for want of proper presentation. Furthermore, there was no other ground upon which a decision could have been ren-

dered which would avoid the federal question. Since the question was properly presented and its determination was necessary for the decision, the Court's failure to pass specifically upon the question is as reviewable as an express decision on the point and the Supreme Court can take jurisdiction over the case.

Reasons for Granting the Writ

1. The decision of the New York court in the instant case upholding the Authority's immunity from suit is in direct conflict with the decision of the United States Supreme Court in *Hopkins v. Clemson College*, 221 U. S. 636. The Court there held that the defendant college, as well as all other public corporations and political subdivisions, although agencies of the state, are not clothed with that immunity from suit which belongs to the state alone; and while they may be relieved from responsibility to a greater degree than individuals, they cannot rely on immunity as can the state. The decision of the New York Court of Appeals in the instant case is directly contradictory in that the Court held that, "There is no jurisdiction in any court of any suit against the Thruway Authority except as the Legislature has in terms created such jurisdiction". 9 N. Y. 2d 486, 489. Thus, just as the state court had done in *Clemson, supra*, the New York court interposed the immunity of the sovereign on behalf of a body, corporate and politic, created by the sovereign, when that body was sued for the violation of a constitutional right. The decision in *Clemson, supra*, points out the constitutional error in New York's approach in that it denies the basic constitutional guarantee of just compensation.

The mere fact that the enabling statute and the state court say that an agency is an instrumentality of the state exercising an essential government function is not decisive in giving it the protection of the Eleventh Amendment. *Lowes v. Pa. Turnpike Commission*, 125 F. Supp. 681.

> "The Eleventh Amendment was not intended to afford them [agents of the state] freedom from liability in any case where, under color of their office, they have injured one of the State's citizens * * *. The whole frame and scheme of the political institutions of this country, State and Federal, protest against extending to any agent the sovereign exemption from legal process." *Hopkins v. Clemson College*, 221 U. S. 636, 643.

2. Even if it were applicable to the Authority, a state's sovereign immunity should be overridden by the federal constitutional requirement of just compensation. It appears that the United States Supreme Court has never had to decide an express conflict between the sovereign immunity guaranteed by the Eleventh Amendment and the Just Compensation Clause of the Fifth Amendment which is included in the Due Process Clause of the Fourteenth Amendment. *Chicago, B. & Q. Ry. Co. v. Chicago*, 116 U. S. 226, 241. This issue has arisen in the highest courts of several states, however, and they have held that the constitutional requirement of just compensation will justify a judgment against the state even where sovereign immunity is expressly raised in defense. *Chick Springs Water Co., Inc. v. State Highway Dept.*, 159 S. C. 481, 157 S. E. 842; *State v. Stanley*, 188 Minn. 390, 247 N. W. 509; *Lehman v. Williams*, 301 Ky. 729, 193 S. W. 2d 161; *Anselmo v. Cox*, 135 Conn. 78, 60 A. 2d 767; *Rose v. State* (Cal.) 105 P. 2d 302. Although many of these cases involved a just compensation provision in their state

constitutions, the basic principles affecting just compensation should be the same whether it is guaranteed by the State or Federal Constitutions. Moreover, most based their decisions on the fact that the provision was self-executing and indeed the just compensation provision of the Federal Constitution has itself also been held to be self-executing. *Jacobs v. United States,* 290 U. S. 13.

As the Court held in the *Chick Springs* case,

> "* * * neither the commonwealth nor any of its political subdivisions, is liable in action *ex delicto* unless made liable by express enactments of the General Assembly *except where the acts complained of, in effect, constituted a taking of private property for public use without just compensation.* * * * [They are] liable when they take property, not on the ground that they are authorized by statute to be sued but because of the constitutional provision requiring compensation to be made for such taking. This protection is afforded to the humblest citizens by the Constitutions of the State and the United States and neither government can itself or by any statute or through any agency take property without paying compensation. Immunity from suit cannot avail in this instance. * * * To hold otherwise would be to say that the Constitution itself gives a right which the Legislature may deny by failing or refusing to provide a remedy. *Such a construction would indeed make the constitutional provision a hollow mockery instead of a safeguard for the rights of citizens.*" 159 S. C. 481, 497-98, 502; 157 S. E. 842, 848, 850. (Emphasis supplied.)

3. There is a conflict between the decisions of New York and several other states on the federal question of the inter-relation of the Eleventh and Fourteenth Amendments. This question has not as yet been passed upon by the United States Supreme Court. As pointed out previously, the decision in the instant case necessarily involved a determination that state immunity superseded

the Constitutional requirement of just compensation, whereas the highest courts in South Carolina, expressly, and Connecticut, California, Minnesota and Kentucky, impliedly, have all held to the contrary in the cases listed in Point 2.

4. The most significant and consequential development in government law in recent years has been the rapidly increasing creation of public authorities by governmental units. New York State alone has created over one hundred public authorities representing a multi-billion dollar operation. Legislative Document (1956) No. 46, *Staff Report on Public Authorities Under New York State*, P. 5. An important implement which the various governments have delegated to these authorities is the power of eminent domain since, to a large extent, they are all involved with the taking of private land for public use. New York State has conferred upon the respondent herein the right to acquire real property by appropriation. New York *Public Authorities Law*, Sec. 358. Under this method of taking real property, the land becomes the property of the Authority or other taking body immediately upon the filing of the appropriate maps. New York *Highway Law*, Sec. 347.

When this power is exercised, it is important that there be sufficient safeguards so that those landowners, who are being deprived in many cases of their most cherished possession, are afforded their Constitutional guarantee of "just compensation" for the land which is taken from them. If we are to permit these Authorities to procure land at an unfair price by whatever fraudulent or forceful methods their agents may use, and then allow them to hide behind the shield of state immunity when a landowner sues to receive his just due, the Constitutional guarantee of Just Compensation will become meaningless.

These governmental agencies have already taken enormous amounts of private land; in the future it can be expected they will take much more.

The New York appropriation statute provides a method whereby the person whose land has been taken may enter into an agreement as to the value of the land. New York *Highway Law*, Sec. 347. Under the decision in the Court below, this agreement stands regardless of the fraud or other unlawful means by which it may have been secured. It is apparent that many of those persons who will have their lands taken from them by the State will be elderly people such as the petitioner and her husband, or persons of lesser intelligence, or persons who would merely rely upon that degree of fairness which they would normally expect when dealing with their State or Federal Government. To protect such persons from being duped by the over-zealous or unscrupulous agent of the taking body, it is essential that immunity not exist in these cases. Otherwise the floodgates will be open to a rash of abuses whereby the lifesavings of an individual may be swept away "without any remedy". *Benz v. New York State Thruway Authority*, 9 N. Y. 2d 486, 490.

5. Fraud can never constitute due process of law, and compensation fraudulently determined is not just compensation. Petitioner has alleged fraud on the part of the respondent in the execution of the agreement wherein the compensation for her land was fixed and such allegation must be accepted as true for the purpose of this proceeding. *Locke v. Pembroke*, 280 N. Y. 430. Therefore, the application of the doctrine of sovereign immunity in the instant case renders the Constitutional guarantees of "Due Process" and "Just Compensation" meaningless.

To avoid such a result, it is essential that Certiorari be granted herein.

Conclusion

For the reasons stated above, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

MARIE BENZ,

Appellant,

v.

NEW YORK STATE THRUWAY AUTHORITY,

Respondent.

Argued March 1, 1961; decided April 27, 1961.

Courts — jurisdiction — Thruway Authority — Supreme Court has no jurisdiction of equitable action against New York State Thruway Authority for rescission or reformation of contract.

The Supreme Court has no jurisdiction of an equitable action against the New York State Thruway Authority for rescission or reformation of a contract for the sale of land to the Thruway Authority (*Easley v. New York State Thruway Auth.*, 1 N. Y. 2d 374, controlling).

Benz v. New York State Thruway Auth., 11 A. D. 2d 906, affirmed.

Points of Counsel

APPEAL, by permission of the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered July 29, 1960, unanimously affirming an order of the Supreme Court at Special Term (ALFRED M. KRAMER, J.), entered in Erie County, granting a motion by defendant to dismiss the complaint.

Lauren D. Rachlin for appellant. I. The State of New York has waived its immunity from actions in equity in section 8 of the Court of Claims Act. (*Psaty v. Duryea*, 306 N. Y. 413; *Bernardine v. City of New York*, 294 N. Y. 361; *Smith v. State of New York*, 227 N. Y. 405; *Breen v. Mortgage Comm.*, 285 N. Y. 425; *Glassman v. Glassman*, 309 N. Y. 436; *Strang v. State of New York*, 206 Misc. 734; *Pantess v. Saratoga Springs Auth.*, 255 App. Div. 426.) II. Even if the State has not waived its immunity from actions in equity, defendant is not immune from suit for recission and/or reformation of a contract. (*Easley v. New York State Thruway Auth.*, 1 N. Y. 2d 374; *Matter of Plumbing Assn. v. New York State Thruway Auth.*, 5 N. Y. 2d 420; *Bird v. New York State Thruway Auth.*, 8 A. D. 2d 495; *Keifer & Keifer v. R. F. C.*, 306 U. S. 381; *Sloan Shipyards v. United States Fleet Corp.*, 258 U. S. 549; *Lacock v. City of Schenectady*, 224 App. Div. 512; *United States v. Michel*, 282 U. S. 656; *Beldon v. Mortgage Comm.*, 173 Misc. 731; *Pantess v. Saratoga Springs Auth.*, 255 App. Div. 426; *MacMullen v. City of Middletown*, 187 N. Y. 37; *Osborn v. United States Bank*, 9 Wheat. [22 U. S.] 738; *United States v. Lee*, 106 U. S. 196.) III. Even if it were held that the doctrine of sovereign immunity applied to defendant, it still may not retain the benefits of a fraud committed by its agent in the performance of a ministerial act. (*People v. Kerr*, 27 N. Y. 188; *Wright v. Shanahan*, 61 Hun 264, 83 Hun 615, 149 N. Y. 495; *People v. Canal Bd.*, 55 N. Y. 390; *Weston v. City of Syracuse*, 158 N. Y. 274; *Sharp v. Mayor of City of N. Y.*, 40 Barb. 256; *Locke v. Pembroke*, 280 N. Y. 430; *Schwartz v. Lubin*, 6 A. D. 2d 108.) IV. The Thruway Authority may be likened to a municipal corporation acting in its corporate capacity. (*Matter of Brown v. Board of Trustees of Town of Hamptonburg*, 303 N. Y. 484; *New York City Tunnel Auth. v.*

Consolidated Edison Co., 295 N. Y. 467; *Moffett, Hodgkins & Co. v. Rochester*, 178 U. S. 373; *Abner M. Harper, Inc. v. City of Newburgh*, 159 App. Div. 695; *Martin v. Mayor of Brooklyn*, 1 Hill 545; *People v. Corporation of Albany*, 11 Wend. 539; *Van Dyke v. City of Utica*, 293 App. Div. 26; *Buck v. City of Lockport*, 6 Lans. 251; *Village of Elmira Hgts. v. Town of Horseheads*, 234 App. Div. 270; *Bloom v. Jewish Bd. of Guardians*, 286 N. Y. 349; *Bernardine v. City of New York*, 294 N. Y. 361.) V. The denial of jurisdiction would constitute an unconstitutional deprivation of property without just compensation. (*Locke v. Pembroke*, 280 N. Y. 430; *United States v. Lee*, 106 U. S. 196; *Chicago, B. & Q. R. R. Co. v. Chicago*, 166 U. S. 226; *Keifer & Keifer v. R. F. C.*, 306 U. S. 381.)

Louis J. Lefkowitz, Attorney-General (*Julius L. Sackman, Paxton Blair* and *James L. Magavern* of counsel), for respondent. I. The State has not waived its immunity from suits in equity. (*Stone v. State of New York*, 138 N. Y. 124; *Matter of Hoople*, 179 N. Y. 308; *Sanders v. Saxton*, 182 N. Y. 477; *Saranac Land & Timber Co. v. Roberts*, 195 N. Y. 303; *Niagara Falls Power Co. v. White*, 292 N. Y. 472; *Psaty v. Duryea*, 306 N. Y. 413; *People v. Canal Bd.*, 55 N. Y. 390; *Mathewson v. New York State Thruway Auth.*, 11 A. D. 2d 782; *Glassman v. Glassman*, 309 N. Y. 436; *Easley v. New York State Thruway Auth.*, 1 N. Y. 2d 374.) II. Respondent, as an instrumentality of the State engaged in an operation which is governmental in nature, is clothed with the sovereign's immunity except with respect to such causes as have been expressly statutorily allowed. No statutory waiver has been enacted which would permit maintenance of the instant cause of action. (*Matter of Plumbing Assn. v. New York State Thruway Auth.*, 5 N. Y. 2d 420; *Bird v. New York State*

Thruway Auth., 8 A. D. 2d 495; *New York City Tunnel Auth. v. Consolidated Edison Co.*, 295 N. Y. 467; *Pantess v. Saratoga Springs Auth.*, 255 App. Div. 426; *Strang v. State of New York*, 206 Misc. 734; *Bloom v. Jewish Bd. of Guardians*, 286 N. Y. 349; *Matter of Brown v. Board of Trustees of Town of Hamptonburg*, 303 N. Y. 484; *Holmes v. County of Erie*, 266 App. Div. 220, 291 N. Y. 798; *Lacock v. City of Schenectady*, 224 App. Div. 512, 251 N. Y. 575; *Wilcox v. City of Rochester*, 190 N. Y. 137; *Le Beau Piping Corp. v. City of New York*, 170 Misc. 644; *Glassman v. Glassman*, 309 N. Y. 436; *New Paltz, H. & P. T. Co. v. County of Ulster*, 202 App. Div. 234; *Voorhis v. Cornell Contr. Corp.*, 170 Misc. 908; *Neddo v. State of New York*, 194 Misc. 379, 275 App. Div. 492, 300 N. Y. 533.) III. The statutory power "to sue and be sued", conferred upon the New York State Thruway Authority, does not detract from its immunity as above set forth. (*Glassman v. Glassman*, 309 N. Y. 436; *Breen v. Mortgage Comm.*, 285 N. Y. 425; *Lacock v. City of Schenectady*, 224 App. Div. 512, 251 N. Y. 575; *Beldon v. Mortgage Comm.*, 173 Misc. 731; *Dietrich v. Palisades Interstate Park Comm.*, 114 Misc. 425; *The Onteora*, 298 F. 553; *Jackson v. State of New York*, 261 N. Y. 134.)

Opinion per Chief Judge Desmond

Chief Judge DESMOND. The courts below, bound as they were by *Easley v. New York State Thruway Auth.* (1 N. Y. 2d 374), correctly held that the Supreme Court has no jurisdiction of this equity suit (or of the equity suit of *Mathewson v. New York State Thruway Auth.*, 9 N. Y. 2d 788, decided herewith). *Easley* held that the Thruway Authority "is an arm or agency of the State" (p. 376) and that "the Legislature could in creating the Thruway

Authority have refused to waive immunity as to it and thus could have forbidden suits to be maintained against the Authority in any court or tribunal" (pp. 376-377). Easley's brief on his appeal to this court made (and we rejected) the identical arguments now made by appellant Benz. The *Easley* decision necessarily meant that there is no jurisdiction in any court of any suit against the Thruway Authority except as the Legislature has in terms created such jurisdiction.

There are just two statutory grants of jurisdiction to sue the Authority. One of them, section 361-b of the Public Authorities Law, discussed in *Easley* (*supra*), confers exclusive jurisdiction upon the Court of Claims to hear and determine all claims against the Authority for alleged torts or breaches of contract. That enactment certainly does not authorize the bringing of these suits in the Supreme Court. The only other statutory grant of jurisdiction to bring actions against the Authority is in subdivision 5 of section 368 of the Public Authorites Law whereby the Legislature in order to permit one particular type of equity suit against the Thruway Authority enacted a special statute therefor.

In the *Easley* opinion (*supra*) we described at length the peculiarly close relationship between the Authority and the State itself and we concluded that for purposes of suit the Thruway Authority was part of the State Government and, accordingly, not suable without a direct waiver of immunity. The reasons for that holding were exactly the same as in *Breen v. Mortgage Comm.* (285 N. Y. 425) and the reasons why the present suit cannot be maintained against the Authority are the same reasons explained by us in *Breen*. Section 8 of the Court of Claims Act did not, so we directly held in the *Breen* opinion, authorize a suit

by Breen in the Supreme Court and this situation was not affected by the statutory direction as to the Mortgage Commission that it may "sue and be sued". The same authorization as to the Thruway Authority (Public Authorities Law, § 354, subd. 1) has no broader meaning.

There may have been some doubt prior to 1954 (see dictum in *Strang v. State of New York*, 296 Misc. 734) as to jurisdiction of such suits as these but that doubt was removed by the legislative determination in 1954, before the Authority began to operate the Thruway, that there would be no jurisdiction of suits against the Authority except in the Court of Claims as to tort and contract claims and in the Supreme Court as to certain suits by bondholders (Public Authorities Law, §§ 354, 368). There is no provision anywhere for equity suits against the Thruway Authority. It would indeed be remarkable if the Legislature which "could have forbidden suits to be maintained against the Authority in any court or tribunal" produced a situation where suits at law could be prosecuted (per express enactment) in the Court of Claims only but (by legislative silence) equity suits would be allowed against the Thruway Authority in the Supreme Court. There is no sign that the lawmakers had any such strange intent.

This leaves plaintiff without any remedy by suit but "the immunity of a state agency is in no way affected by the lack of any other remedy" (*Glassman v. Glassman*, 309 N. Y. 436, 441; see *Psaty v. Duryea*, 306 N. Y. 413, 420).

The judgment should be affirmed, without costs.

Dissenting opinion per Van Voorhis, J.

VAN VOORHIS, J. (dissenting). This is an equitable action in the Supreme Court for rescission or reformation of a contract for the sale of land to the New York State Thruway Authority. The complaint alleges that due to mutual mistake or mistake of plaintiff induced by fraud of defendant's agent the purchase price in this contract amounted to approximately 1/20 of the agreed value of the appropriated land. The complaint has been dismissed on motion for lack of jurisdiction on the basis that the Thruway Authority enjoys governmental immunity from suits of this nature. The answer to this question requires examination of the doctrine of governmental immunity and of the decisions on the nature of the Thruway Authority as a public authority.

Section 8 of the Court of Claims Act was amended in 1939 so as to provide: "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined *in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations*, provided the claimant complies with the limitations of this article" (italics supplied). This section is held to constitute a waiver of the governmental immunity of all of the civil divisions of the State—counties, cities, towns, villages, and by the same token, public authorities (*Bernardine v. City of New York*, 294 N. Y. 361). In the *Bernardine* case this court said (p. 365): "The legal irresponsibility heretofore enjoyed by these governmental units was nothing more than an extension of the exemption from liability which the State possessed." Ironically this waiver is circumscribed in causes of action against the State itself, due to the circumstance that the State can be sued only in

the Court of Claims and section 9 of the Court of Claims Act has been held to be too narrow to cover jurisdiction over equitable actions (*Psaty v. Duryea*, 306 N. Y. 413). This does not alter the fact that all other governmental units in the State may be sued in the Supreme Court like individuals or private corporations (Court of Claims Act, § 8; *Bernardine v. City of New York, supra*). Waiver of governmental immunity is a consequence of the "rising tide of criticism against the doctrine of sovereign irresponsibility" (*Miller v. Town of Irondequoit*, 243 App. Div. 240, 241, per LEWIS, J., affd. 268 N. Y. 578). It is not the policy of the courts to restrict the waiver of immunity which has become so firmly a part of the public policy of the State.

Upon the creation of the New York State Thruway Authority in 1950 as "a body corporate and politic" (Public Authorities Law, § 352) with power "To sue and be sued" (Public Authorities Law, § 354, subd. 1), it could be sued in like manner as a private corporation in view of the waiver of immunity from liability ordained by section 8 of the Court of Claims Act expressly applying "to actions in the supreme court" (*Pantess v. Saratoga Springs Auth.*, 255 App. Div. 426). Indeed, until the adoption in 1954 of section 361-b of the Public Authorities Law, the Attorney-General's office successfully maintained that the Supreme Court had jurisdiction even of tort claims against the Thruway Authority to the exclusion of the jurisdiction of the Court of Claims (*Strang v. State of New York*, 206 Misc. 734).

In 1954 section 361-b was added to the Public Authorities Law purporting to confer upon the Court of Claims exclusive jurisdiction of claims against the Thruway Authority for its tortious acts and for breach of contract. The constitutionality of that section was tested in *Easley v.*

Thruway Auth. (1 N. Y. 2d 374) which was challenged in view of the section added in 1950 to the State Constitution providing that the Court of Claims shall have jurisdiction to hear and determine claims against the State (art. VI, § 23). There was held to be sufficient identity between the Thruway Authority and the State to give effect to section 361-b of the Public Authorities Law notwithstanding this provision in the State Constitution.

Nevertheless, it was recognized in *Matter of Plumbing Assn. v. New York State Thruway Auth.* (5 N. Y. 2d 420, 424) that the *Easley* decision does not mean that the Thruway Authority "'*is* the State'" (italics from original), but that it is a public corporation "independent and autonomous, deliberately designed to be able to function with a freedom and flexibility not permitted to an ordinary State board, department or commission." (p. 423). If there had been held to be the identity between the State and the Thruway Authority that is asserted on this appeal, the *Plumbing Association* case could not have been decided as it was.

Easley (*supra*) did not hold that actions against the Thruway Authority were forbidden to be maintained in the Supreme Court by section 9 of the Court of Claims Act, but only that causes of action in tort and for breach of contract were required to be prosecuted in the Court of Claims by section 361-b of the Public Authorities Law. Between 1950 and 1954, prior to the enactment of section 361-b, the Thruway Authority could, indeed, be sued only in the Supreme Court. Section 361-b of the Public Authorities Law does not purport (like Court of Claims Act, § 9) to provide that the Thruway Authority is immune from suit except in the Court of Claims. It simply directs, as stated

in its title, that exclusive jurisdiction "in certain suits against the authority" is conferred upon the Court of Claims. The Legislature deemed it advisable that claims against the Authority for tort or breach of contracts for construction, maintenance or operation should be decided in the Court of Claims, as they would be if they concerned ordinary State highways, but the Legislature was careful to state that exclusive jurisdiction in suits against the Authority was vested in the Court of Claims in those instances only. If the intention had been to confer exclusive jurisdiction on the Court of Claims in all instances, it would have been simple to have said so. The reason for the elaboration in the wording of this section is evidently to define the types of suits against the Authority which are cognizable solely by the Court of Claims, reserving jurisdiction in the Supreme Court over other causes of action within the general waiver of immunity expressly applicable to it (Court of Claims Act, § 8).

For these reasons, the order was erroneously granted dismissing the complaint on the ground that the Supreme Court has not jurisdiction of the subject of the action and the judgment entered thereon should be reversed.

Judges Dye, Froessel and Foster concur with Chief Judge Desmond; Judge Van Voorhis dissents in an opinion in which Judges Fuld and Burke concur.

Judgment affirmed.